

Message Text

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ORIGIN TRSE-00

INFO OCT-01 EUR-12 IO-13 ISO-00 EB-08 STR-04 L-03 FEA-01
AGRE-00 CEA-01 CIAE-00 COME-00 DODE-00 FRB-03 H-01
INR-07 INT-05 LAB-04 NSAE-00 NSC-05 PA-01 AID-05
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DRAFTED BY TREAS:MGADBAW:MH
APPROVED BY EB/OT/STA:JSSPIRO
EB/OT:WGBARRACLOUGH
STR:TGRAHAM
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FM SECSTATE WASHDC
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E.O. 11652: N/A

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SUBJECT: GATT COUNCIL CONSIDERATION OF DISC AND RELATED
TAX PRACTICES

REF: (A) STATE 43020, (B) GENEVA 01430,
(C) GENEVA 1482
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1. SHOULD ANYONE RAISE QUESTION REGARDING THE U.S.
STATEMENT PER REF A PARA 5 THAT THE GATT COUNCIL SHOULD
CONSIDER ADOPTION OF THE FOUR REPORTS BEFORE IT TAKES UP
THE QUESTION OF RECOMMENDATIONS, U.S. REP SHOULD BE GUIDED
BY THE FOLLOWING.

2. TO OUR KNOWLEDGE, THERE HAS NEVER BEEN A PANEL OR WORKING PARTY REPORT IN CONNECTION WITH AN ARTICLE XXIII DISPUTE IN WHICH THE GATT COUNCIL, ACTING ON BEHALF OF THE CONTRACTING PARTIES, HAS NOT ADOPTED THE REPORT. THIS FACT HAS SIGNIFICANCE BOTH IN TERMS OF GATT PRACTICE AND THE EXPLICIT PROVISIONS OF GATT ARTICLE XXIII.

3. IN THE DISPUTE UNDER ARTICLE XXIII REGARDING THE DISC AND THE RELATED TAX PRACTICES OF FRANCE, BELGIUM AND THE NETHERLANDS, THE QUESTION REFERRED TO THE CONTRACTING PARTIES WAS WHETHER THESE PRACTICES ARE CONSISTENT WITH

THE GENERAL AGREEMENT. HOWEVER, ONLY THE CONTRACTING PARTIES CAN MAKE A RULING UNDER ARTICLE XXIII. THEREFORE, THE FIRST ISSUE FOR THE COUNCIL IS TO DETERMINE WHETHER TO ADOPT, IN ACCORDANCE WITH GATT PRACTICE, THE CONCLUSIONS OF THE PANELS. (SEE GATT DOC L/392/REV. 1 9 OCTOBER 1955.) ONLY IN THIS WAY CAN THE CONCLUSIONS OF THE PANELS BECOME RULINGS OF THE CONTRACTING PARTIES UNDER ARTICLE XXIII. WITHOUT ADOPTION, THE COUNCIL WOULD HAVE NO BASIS ON WHICH TO MAKE RECOMMENDATIONS BECAUSE THE STATUS OF THESE PRACTICES UNDER THE GATT WOULD BE UNCLEAR.

4. FACT THAT ARTICLE XXIII DOES NOT REFER TO ADOPTION OF

PANEL REPORTS DOES NOT UNDERMINE ARGUMENT THAT GATT PRACTICE IS TO ADOPT REPORTS PRIOR TO MAKING RECOMMENDATIONS. ART. XXIII ALSO DOES NOT REFER TO CREATION OF PANELS, YET THIS IS A TIME-HONORED PRACTICE.
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5. AS APPROPRIATE, U.S. REP MIGHT POINT OUT THAT EVEN IN DISPUTES WHERE ONE OF THE PARTIES HAD SERIOUS PROBLEMS WITH A REPORT OF A WORKING PARTY AND EVEN FILED A MEMORANDUM IN OPPOSITION, AS THE AUSTRALIANS DID IN THE AUSTRALIAN SUBSIDY CASE, THAT PARTY DID NOT BLOCK THE ADOPTION OF THE REPORT BY THE CONTRACTING PARTIES. (SEE GATT/CP. 4/39 AND GATT/CP.4/SR.21 APRIL 3, 1950.)

6. RE REF (C) AND PARA 7 BELOW, IF ANY DELEGATION TRIES TO REOPEN ANY OF THE PANELS REPORTS ON THE PRACTICES OF FRANCE, BELGIUM OR THE NETHERLANDS, THE US REP SHOULD REPEAT THAT WE BELIEVE THE GATT COUNCIL SHOULD ADOPT ALL FOUR REPORTS TOGETHER. THE US VIEWS ANY ATTEMPT TO REOPEN THE PANELS AS AN EFFORT TO BLOCK ANY ACTION ON THESE REPORTS. SUCH AN ATTEMPT IS UNPRECEDENTED IN THE GATT AND WOULD UNDERMINE THE ENTIRE DISPUTE SETTLEMENT PROCESS. PROBABLY A BASIS COULD BE FOUND FOR CRITICIZING OR QUESTIONING SPECIFIC POINTS IN THE DISC OR ANY OTHER GATT PANEL REPORT. HOWEVER,

AFTER THE CONSIDERABLE TIME AND EFFORT THAT HAS BEEN SPENT IN REACHING THEIR CONCLUSIONS, THE US SEES NO PURPOSE IN REOPENING THESE PANELS. THEREFORE, THE US COULD NOT ACCEPT THE REOPENING OF THE PANELS THROUGH ADDITIONAL QUESTION OR OTHERWISE AND US REP SHOULD BLOCK, IF NECESSARY, ANY SUCH ATTEMPT. IN THIS REGARD, TACTIC SUGGESTED PARA 3 REF (C) SEEMS TO US TO RISK - BY JOINING IN QUESTIONING OF PANEL REPORTS - A CONCLUSION THAT ALL REPORTS MIGHT BE RETURNED TO THE PANELS FOR FURTHER WORK, AN OUTCOME WHICH SHOULD BE AVOIDED.

7. TREASURY HAS BEEN INFORMED BY FRENCH OFFICIAL KERLAN, CURRENTLY IN WASHINGTON ON TAX NEGOTIATION, THAT FRANCE, BELGIUM AND THE NETHERLANDS PLAN TO RESERVE INDIVIDUALLY WITH REGARD TO THE REPORT ON THEIR RESPECTIVE PRACTICES UNTIL CERTAIN CONCLUSIONS OF THE PANELS ARE CLARIFIED.
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THEIR SPECIFIC OBJECTION IS THAT THOSE REPORTS USED AN OVERLY BROAD CONCEPT OF EXPORTING IN ARRIVING AT THEIR CONCLUSIONS REGARDING EXPORT SUBSIDIES. THIS ARGUMENT IS INTENDED TO DISTINGUISH THE EUROPEAN TAX PRACTICES FROM THE DISC BY NARROWLY DEFINING EXPORTING AS THE MERE PHYSICAL TRANSFER OF GOODS ACCROSS NATIONAL BORDERS WHICH THEY WILL ARGUE IS THE STANDARD GATT DEFINITION. FOR REASONS STATED IN PARA 6 ABOVE, THE US WOULD REJECT SUCH AN ARGUMENT. FURTHERMORE, THE US DOES NOT VIEW THIS ARGUMENT AS A POINT OF CLARIFICATION BUT A REJECTION OF THE PANELS' ANALYSIS.
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